No. 178

JUL 3 1950

CHARLES ELMORE CROPLE
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

The North Little Rock Transportation Company, Inc. ____ Petitioner

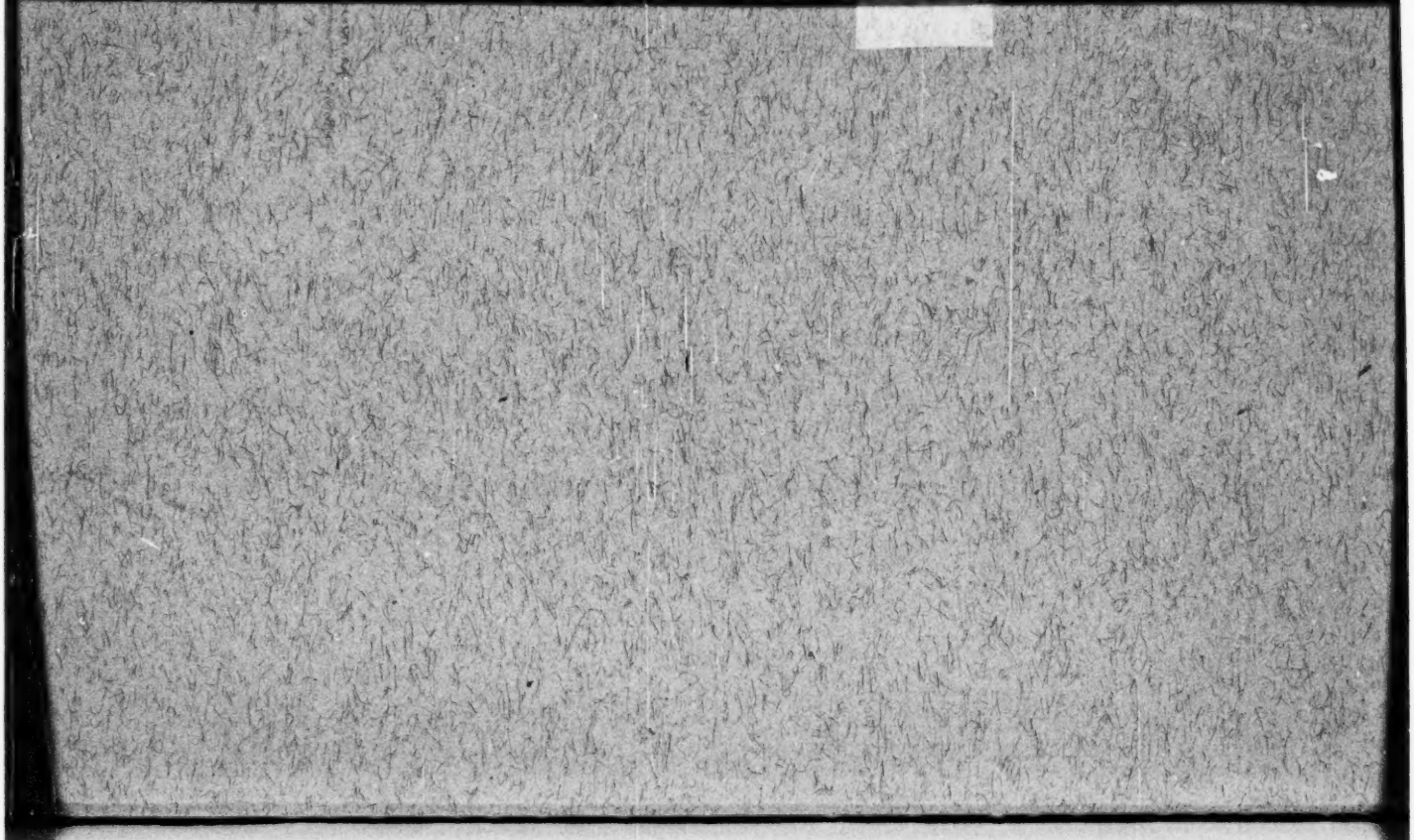
v.

Casualty Reciprocal Exchange, The Aetna Casualty and Surety Company, National Bureau of Casualty Underwriters, American General Insurance Company, American Guarantee and Liability Insurance Company, American Surety Company of New York, Arex Indemnity Company, Association Employers Lloyds, Bankers Indemnity Insurance Company, Carolina Casualty Insurance Company, The Century Indemnity Company, Columbia Casualty Company, Commercial Casualty Insurance Company, Commercial Standard Insurance Company, The Connecticut Indemnity Company, Eagle Indemnity Company, Employers Casualty Company, Factory Mutual Liability Insurance Company of America, The Fidelity and Casualty Company of New York, Fidelity and Deposit Company of Maryland, Firemen's Fund Indemnity Company, General Insurance Corporation, Glens Falls Indemnity Company, Globe Indemnity Company, Great American Indemnity Company, Hartford Accident and Indemnity Company, The Home Indemnity Company of New York, London Guarantee and Accident Company, Limited, Manufacturers and Merchants Indemnity Company, Maryland Casualty Company, Massachusetts Bonding and Insurance Company, The Metropolitan Casualty Insurance Company of New York, National Automobile and Casualty Insurance Company, National Surety Corporation, New Amsterdam Casualty Company, New York Casualty Company, The Ocean Accident and Guarantee Corporation, Limited, Pacific Employers Insurance Company, Phoenix Indemnity Company, Royal Indemnity Company, Service Casualty Company of New York, Standard Accident Insurance Company, Traders and General Insurance Company, The Travelers Indemnity Company, The Travelers Insurance Company, United National Indemnity Company, United States Casualty Company, United States Fidelity and Guaranty Company, Zurich General Accident and Liability Insurance Company, Limited, Consolidated Underwriters, Highway Insurance Underwriters ____ Respondents

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND SUPPORTING BRIEF

A. F. House
Frederick U. Andres
William Nash
Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK



INDEX

	Page
Summary statement of the matter involved	1
Jurisdiction	3
Questions presented	4
Reasons relied upon for the allowance of the writ	5
Prayer in petition	6
Opinions of Courts below	7
Statement of case	7
Specification of errors	7
Argument:	
Summary of argument	8
Point A	9
Point B	10
Point C	12
Point D	14
Conclusion	15

LIST OF AUTHORITIES

Cases Cited

Belknap *v.* U. S., 150 U. S. 588	11
Dunwoody *v.* U. S., 143 U. S. 578	11
Hooper *v.* California, 155 U. S. 648	9
Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149	13
Levy *v.* Stockslager, 129 U. S. 470	12
Matthews *v.* U. S., 123 U. S. 182	11

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Page

New York Life Insurance Co. *v.* Deer Lodge County, 231 U. S. 495 9

Paul *v.* Virginia, 8 Wall. (75 U. S.) 168 9

Prudential Insurance Co. *v.* Benjamin, 328 U. S. 408 9

Robertson *v.* California, 328 U. S. 440 9

Southern Pacific Co. *v.* Jensen, 244 U. S. 205 13

United States *v.* Dickerson, 310 U. S. 554 11

United States *v.* Langston, 118 U. S. 389 11

United States *v.* Mitchell, 109 U. S. 146 10

United States *v.* South-Eastern Underwriters Association, 322 U. S. 533 9

United States *v.* Vulte, 233 U. S. 509 11

Washington *v.* Dawson & Co., 264 U. S. 219 13

Federal Statutes

McCarran Act, 15 U.S.C. 1011-1015; 59 Stat. 33, 34; P. L. 15, 79th Cong., 1st Sess., c. 20, Secs. 1-5 as amended, P. L. 238, 80th Cong., 1st Sess., c. 326 3

Sherman Act, 15 U.S.C. 1; c. 647, Sec. 1, 26 Stat. 209 1

State Statutes

Ark. Constit., Art. 2, Sec. 19 4

Act 116, Ark. Laws, 1947 (Secs. 66-417—66-433, Ark. Stat., 1947) 3

Ark. Stat. (1947), Secs. 66-203 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

THE NORTH LITTLE ROCK TRANSPORTATION COMPANY, INC. ..... *Petitioner*

v. No. .....

CASUALTY RECIPROCAL EXCHANGE, ET AL ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Supreme Court
of the United States:

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action for treble damages and injunctive relief based upon an alleged violation of Section 1 of the Sherman Act (R.1-8).

The premiums for casualty insurance charged petitioner, a taxicab company operating in the area of Little

Rock, Arkansas, were fixed by respondent, National Bureau of Casualty Underwriters (R.43). In fixing these premiums, petitioner was not consulted (R.40). These premiums were mandatory upon all of its members (R. 170, 155) and subscribers (R.173, 155), among whom are the forty-nine casualty insurance company respondents, except Casualty Reciprocal Exchange (R.4, 8, 15). These respondents control more than sixty-six per cent of all automobile liability insurance written in the State of Arkansas by stock companies and more than fifty-six per cent written by insurance companies of all kinds (R.155-159, 155). If petitioner had secured its insurance from any material fact, that they were entitled to a judgment (R.153). This is true for any other taxicab company in the State of Arkansas (R.45). All casualty stock insurance companies doing business in Arkansas are eligible for membership in the National Bureau of Casualty Underwriters (R.152).

Petitioner filed suit on August 17, 1948 (R.1), and, before joinder of issue, took depositions (R.26-149). Respondents filed their answers on January 10, 1949, and January 15, 1949 (R.8, 15), and on February 11, 1949, the Insurance Commissioner of Arkansas intervened to support respondents (R.24). Thereafter, the parties stipulated as to the facts (R.155-216).

Respondents filed motions for summary judgment (R. 217-218) alleging that there was no genuine issue as to any material facts, that they were entitled to a judgment as a matter of law, and that their acts complained of were regulated by the laws of Arkansas, were in accordance with the laws of Arkansas and the United States, and had not violated the Sherman Act.

On September 8, 1949, the Court sustained the motions for summary judgment on the ground that the Sherman Act was validly suspended by the McCarran Act, that the acts of respondents were validly regulated by Act No. 116 of the Acts of Arkansas for 1947 and that the Sherman Act was not violated by acts authorized by State statute (R.228, 220-227).

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit which affirmed the judgment of the Court below.

II

JURISDICTION

1. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28 USCA Sec. 1254 (a).

2. The validity of the McCarran Act is involved. This Act, approved March 9, 1945, makes the business of insurance subject to the laws of the several states which relate to the regulation or taxation of such business and suspends until January 1, 1948, the applicability of the Sherman and Clayton Acts to the business of insurance. Also involved is the validity of Act No. 116 of the Acts of Arkansas of 1947 which authorizes and regulates cooperative action among insurers in rate fixing and related matters.

3. The date of the judgment to be reviewed is April 5, 1950. This petition has been filed within the time provided under Title 28 USCA, Sec. 2101 (c).

III

QUESTIONS PRESENTED

1. Whether Congress may, except under the war powers, suspend a general law for a period of time as the McCarran Act purports to suspend the Sherman and Clayton Acts.

2. Whether Congress may delegate to individual States power to legislate in the regulation of the insurance business transactions within the commerce clause of the federal Constitution with reference to which Congress has already acted, which is the intent and effect of the McCarran Act.

3. Whether, in the event the McCarran Act is valid, Act No. 116 of the Acts of Arkansas of 1947 is proper regulation within the McCarran Act.

4. Whether Act No. 116 of the Acts of Arkansas of 1947 violates Article 2 Sec. 19 of the Constitution of the State of Arkansas as follows:

> "Section 19. *Perpetuities and monopolies*—Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges or honors ever be granted or conferred in this State."

and whether said Act No. 116 is contrary to the anti-trust laws of the State of Arkansas as follows:

> Section 66-203, Arkansas Statutes 1947—"*Anti-trust regulations*—Any foreign or domestic insurance corporation is hereby permitted to do business in this State without fine or forfeiture, upon compliance with the insurance laws of this State; provided, that such corporation is not a member of or

a party to any pool, trust, agreement, combination, confederation, or understanding made in this State or elsewhere, to regulate, fix or maintain insurance premiums or property in this State. (Act Apr. 17, 1907, No. 184, Section 1, p. 430; C. & M. Dig., Sections 5976, 7369; Pope's Digest, Sections 7663, 9408.)"

5. Whether the conduct of respondents violates the Sherman Act.

IV

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the United States Circuit Court of Appeals for the Eighth Circuit that the McCarran Act validly suspends the Sherman and Clayton Acts involves important questions of federal law which have not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals that the McCarran Act validly subjects the business of insurance to state regulation is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

3. Whether the McCarran Act is valid is of great importance to the business world generally and in particular to the casualty insurance business which is nationwide in its scope and affects every person and every business. In the uncertainty and doubt which must exist until this Court has decided the point, there is imperative need of an authoritative and elucidating decision.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Court of Appeals for the Eighth Circuit had in the case numbered and entitled on its docket No. 14,061, *The North Little Rock Transportation Company, Inc., Appellant,* v. *Casualty Reciprocal Exchange, et al, Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Eighth Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

Respectfully submitted

A. F. House

Frederick U. Andres

William Nash

Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

THE NORTH LITTLE ROCK TRANSPORTATION COMPANY, INC. ..... *Petitioner*

v. No. .....

CASUALTY RECIPROCAL EXCHANGE, ET AL ..... *Respondents*

SUPPORTING BRIEF

I

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 181 F. (2d) 174. The opinion of the United States District Court for the Eastern District of Arkansas, Western Division (R.220-227) is reported in 85 F. Supp. 961.

II

STATEMENT OF CASE

We adopt the statement of the case as set forth in the preceding petition and do not here restate it.

III

SPECIFICATION OF ERRORS

1. The Court of Appeals for the Eighth Circuit erred in holding that the McCarran Act was a valid suspension of the Sherman and Clayton Acts.

2. The said Court erred in holding that the McCarran Act was a valid delegation to the individual states of power

to regulate transactions within the commerce clause of the federal Constitution with reference to which Congress has already acted.

3. In the event the McCarran Act were valid, the said Court erred in holding that Act No. 116 of the Acts of the State of Arkansas of 1947 is proper regulation within the McCarran Act.

4. The said Court erred in holding said Act No. 116 of the Acts of Arkansas of 1947 valid under the Constitution of the State of Arkansas.

5. The said Court erred in holding that said Act No. 116 of the Acts of Arkansas of 1947 repealed Sections 66-203, Arkansas Statutes, 1947.

6. The said Court erred in holding that the acts of the respondents were not in violation of the Sherman Act.

IV

ARGUMENT

Summary of Argument

Point A: The decision of the Court of Appeals for the Eighth Circuit involves the important question of federal law whether the McCarran Act is valid when that question, under facts as presented in this case, has not been, but should be, settled by this Court.

Point B: The decision of the said Court involves the important question of federal law whether Congress may suspend a general law when that question has not been, but should be, settled by this Court.

Point C: The decision of the Court of Appeals for the Eighth Circuit decides that Congress may delegate

to individual states power to regulate transactions within the commerce clause of the federal Constitution with reference to which Congress has already acted and is probably in conflict with applicable decisions of this Court.

Point D: Whether the McCarran Act is valid is of great importance to the business world generally and in particular to the casualty insurance business, and this Court should remove the existing uncertainty and doubt.

Point A

This Court has not, under facts as presented in this case, passed upon the validity of the McCarran Act.

The McCarran Act has been before this Court in two cases: *Prudential Insurance Company* v. *Benjamin,* 328 U. S. 408, and *Robertson* v. *California,* 328 U. S. 440.

In the *Prudential* case, the Court held valid a tax statute of South Carolina passed before the decision of this Court in *United States* v. *South-Eastern Underwriters Association, et al,* 322 U. S. 533. The facts presented in the *Prudential* case were the same as those in *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; and *New York Life Insurance Company* v. *Deer Lodge County,* 231 U. S. 495, each of which involved a state tax statute only, and in each of which the Court held that, under specific facts presented, transactions of insurance were not interstate commerce. In the *S. E. U. A.* case the Court, in holding for the first time that a fire insurance company which conducts a substantial part of its business transactions across state lines is engaged in commerce among the several states and is subject to regulations under the commerce clause, was careful to hold that the S. E. U. A. case did not overrule the *Paul,*

Hooper and *Deer Lodge* cases, and upon their particular facts the decisions were undisturbed.

Therefore, in the *Prudential* case, the Court would have followed the *Paul, Hooper* and *Deer Lodge* cases under the holding in the *S. E. U. A.* case, and the decision in the *Prudential* case would have been the same in the absence of the McCarran Act. A consideration of the McCarran Act was unnecessary to the decision, and the validity of the Act was not involved.

Moreover, this case involves regulation, not taxation, of insurance companies.

In the *Robertson* case, the Court passed upon an alleged criminal violation which occurred before the passage of the McCarran Act, so that necessarily the validity of the Act was not involved.

It remains that this Court has not, under facts as presented in this case, passed upon the validity of the McCarran Act.

Point B

This Court has not, except in a limited line of conflicting decisions, ever held that Congress may suspend a general law other than under war powers, which are not here involved.

The only language ever used by the Court to suggest that Congress has power to suspend a general law has been in cases on appropriation statutes, and in most of these cases it is clear that, in effect, Congress repealed, rather than suspended.

The first case seems to be *United States* v. *Mitchell*, 109 U. S. 146. Section 2070 of the Revised Statutes fixed

certain salaries at $500 a year. Subsequent statutes appropriated only $300, and finally Section 2070 was specifically repealed. Mitchell sued for the difference in salary. The Court said that the appropriation act "suspends" the law, but the Court also said that the intention of Congress to fix the salaries at $300 each was plain upon the statutes. The subsequent appropriation statute actually repealed, rather than suspended, Section 2070.

Similar facts are present in *Matthews* v. *United States,* 123 U. S. 182, *Dunwoody* v. *United States,* 143 U. S. 578; *Belknap* v. *United States,* 150 U. S. 588, and *United States* v. *Dickerson,* 310 U. S. 554. In all of these cases, it is clear from the actual holding of the Court that the appropriation statutes were treated as repealing a former statute.

United States v. *Vulte,* 233 U. S. 509, may afford a genuine instance in which Congress suspended a statute, for it appears that a 1902 statute was suspended by appropriation statutes in 1906 and 1907 and was restored by statute of 1908. If this is an exception, it will be noted that the suspending statutes did not provide for automatic restoration at a given time.

In the leading case of *United States* v. *Langston,* 118 U. S. 389, the Court arrived at a different conclusion. Revised Statutes, Section 1683, created certain positions and provided salaries therefor. In a subsequent appropriation act, Congress appropriated less money than was specified in Section 1683. Langston was held entitled to the difference, the Court holding that Congress could not suspend Section 1683 by an appropriation statute.

The *Langston* case, holding that Congress could not suspend a statute, was affirmed specifically in every subsequent case, including the *Matthews, Dunwoody, Belknap* and *Dickerson* cases, and even in the *Vulte* case, all of them based upon appropriation statutes.

The only other case on this power to suspend is *Levy* v. *Stockslager,* 129 U. S. 470, which also involved a type of appropriation act, and in which it was found that Congress actually repealed, rather than suspended.

There seem to be no other cases in which this Court has had before it the question whether Congress may suspend a general act for a limited time. In contrast to these conflicting decisions, all based upon appropriation statutes, in this case there is presented to the Court the important question of federal law whether Congress actually has power to suspend a general law, and this question should be settled now by this Court.

If it should be urged that the question has been settled by these cases on appropriation statutes, then the decision of the Court of Appeals for the Eighth Circuit is a decision of a federal question probably in conflict with the *Langston* case, which has been affirmed by this Court in every subsequent case, and for that reason the Court is requested to grant the writ of certiorari as prayed.

Point C

The decision of the Court of Appeals for the Eighth Circuit that Congress may delegate to individual states the power to regulate transactions within the commerce clause, with reference to which Congress has already acted,

is probably in conflict with applicable decisions of this Court.

Congress attempted, by amendment to Clause 3 of Section 24, and to Clause 3 of Section 256 of the Judicial Code, to delegate to the states the power to provide Workmen's Compensation in admiralty and maritime matters, with reference to which Congress had already acted by giving to federal courts the exclusive jurisdiction of admiralty and maritime causes. This Court held in *Knickerbocker Ice Company* v. *Stewart*, 253 U. S. 149, that Congress cannot transfer its legislative power to the states, that by nature this power is non-delegable, and cited numerous cases to sustain its position.

After the *Knickerbocker* case, Congress tried again by amendment to the Judicial Code to delegate to the states the power to provide Workmen's Compensation in admiralty and maritime matters, but this Court held again in *Washington* v. *Dawson & Co.*, 264 U. S. 219, that while Congress had power to alter, amend, or revise the maritime law by statutes of general application, it could not delegate that power to the several states.

Maritime law and interstate commerce law are not mutually exclusive, for this Court has borrowed from decisions in interstate commerce to support its holdings in maritime cases, as in *Southern Pacific Company* v. *Jensen*, 244 U. S. 205.

The decision here to be reviewed appears to be in conflict with the *Knickerbocker* and *Washington* cases, and the conflict should be settled.

Point D

Whether the McCarran Act is valid is of great importance to the business world generally and in particular to the casualty insurance business, and this Court should remove the existing uncertainty and doubt.

This Court has fully recognized, in the *S. E. U. A.* case, the importance and vast ramifications of the insurance business, and it is unnecessary to elaborate on it here. The two cases to reach this Court, as an aftermath of the *S. E. U. A.* case, the *Prudential* case and the *Robertson* case, do not pass upon the validity of the McCarran Act under facts here presented, and until the validity of the Act is squarely presented to this Court in a proper case there must be uncertainty and doubt.

Act No. 116 of the Acts of Arkansas of 1947, to regulate premium fixing and related matters, was passed during the moratorium provided by the McCarran Act, and virtually all of the states enacted or revised general regulatory laws concerning the business of casualty insurance (R.11). The United States District Court held in the first instance in this case that, except for the McCarran Act, the rate fixing activities of the respondents would constitute a violation of the Sherman Act (R.226). Doubtless, except for the McCarran Act, and, notwithstanding the regulatory legislation in the several states, the premium fixing activities of the insurance companies would fall under the Sherman Act. Only this Court can say with finality whether the McCarran Act is valid.

In the uncertainty and doubt which must exist until the Court has decided the point, there is imperative need of an authoritative and elucidating decision.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

A. F. House

Frederick U. Andres

William Nash

Counsel for Petitioner

No. 178

AUG 2 1950

CHARLES ELMORE CROPL
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

THE NORTH LITTLE ROCK TRANSPORTATION COMPANY, INC.,

Petitioner,

versus

CASUALTY RECIPROCAL EXCHANGE, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS NATIONAL BUREAU OF CASUALTY UNDERWRITERS, AETNA CASUALTY & SURETY CO., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT:	
(I) The Sherman Act is inapplicable to cooperative action among insurers in rate making and related matters, to the extent that such activities are regulated by State law	6
(A) Background of the applicable principles and statutes	6
(B) Wholly apart from the McCarran Act, rating combinations do not violate the Sherman Act if they are regulated by State law; by that statute, Congress expressly declared that State regulation of the insurance business is in the public interest, and provided that the States may permit, under public regulation, rating combinations and other activities which might otherwise violate the Sherman Act	8
(II) The acts of these respondents were authorized and regulated by valid State laws	13
(III) The motion for summary judgment was properly granted	15
CONCLUSION	17

Citations

CASES: PAGE

Associated Press v. *United States*, 332 U. S. 392 (1947) 16–17

Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311 (1917) 12

Clark Oil Co. v. *Phillips Petroleum Co.*, 148 F. 2d 580 (8th Cir. 1945), cert. denied 326 U. S. 734 (1945) 17

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515 (1945) 13

Davis v. *Department of Labor*, 317 U. S. 429 (1942) 12

Field v. *Barber Asphalt Paving Co.*, 194 U. S. 618 (1904) 8–9

International Salt Co. v. *United States*, 332 U. S. 392 (1947) 16

Keogh v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156 (1922) 15

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149 (1920) 11–12

Madeirense Do Brasil S/A v. *Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (2d Cir. 1945), cert. denied 325 U. S. 861 (1945) 16

McLean Trucking Co. v. *United States*, 321 U. S. 67 (1944) 9, 13

National Union Fire Ins. Co. v. *Dickinson*, 128 Ark. 367, 194 S. W. 254 (1917) 14

New York Central Securities Corp. v. *United States*, 287 U. S. 12 (1932) 13

PAGE

North Little Rock Transportation Co. v. *Casualty Reciprocal Exchange, et al.*, 85 F. Supp. 961 (E. D. Ark. 1949); 181 F. 2d 174 (8th Cir. 1950). 2

Olsen v. *Smith*, 195 U. S. 332 (1904) 8
Osborn v. *Ozlin*, 310 U. S. 53 (1940) 9

Panhandle East. Pipe Line Co. v. *Public Service Commission*, 332 U. S. 507 (1947) 11
Parker v. *Brown*, 317 U. S. 341 (1943) 8
Parker v. *Motor Boat Sales*, 314 U. S. 244 (1941) .. 12
Prudential Insurance Co. v. *Benjamin*, 328 U. S. 408 (1946) 9, 12, 13

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496 (1941) 15–16
Railroad Commission of Texas v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; 311 U. S. 615 (1940) 16
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924) 12
Robertson v. *California*, 328 U. S. 440 (1946) 11

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 (1940) 13

Terminal Warehouse Co. v. *Pennsylvania R.R. Co.*, 297 U. S. 500 (1936) 16

United States v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944) 6, 9, 10, 14
United States Navigation Co. v. *Cunard S.S. Co.*, 284 U. S. 474 (1932) 15

Walling v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (2d Cir. 1946), cert. denied, 328 U. S. 870 (1946) 16

STATUTES: PAGE

McCarran Act, 15 U. S. C. 1011-1015; 59 Stat. 33, 34; P. L. 15, 79th Cong., 1st Sess., c. 20, Secs. 1-5, as amended, P. L. 238, 80th Cong., 1st Sess., c. 326 ..... 7, 8, 9, 10, 11, 12, 13, 14
Sherman Act, 15 U. S. C. 1; c. 647, Sec. 1, 26 Stat. 209 ..... 1, 5, 6, 8, 15, 17
Act No. 116, Ark. Laws, 1947 (Secs. 66-417-66-433, Ark. Stat., 1947) 13, 15

CONGRESSIONAL MATERIAL:

91 Cong. Rec. 1442 (1945) 9
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91 Cong. Rec. 1486 (1945) 9
H. R. Bills 3269, 3270, 78th Cong., 1st Sess. 6
Joint Hearings on S. 1362, H. R. 3269, H. R. 3270 before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st and 2nd Sess., Parts 1-6 6
S. 1362, 78th Cong., 1st Sess. 6
H. R. Rep. No. 68, 79th Cong., 1st Sess. (1945) 9
H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945) ... 9
H. R. Rep. No. 213, 79th Cong., 1st Sess. (1945) ... 9
Sen. Rep. No. 20, 79th Cong., 1st Sess. (1945) 9
Sen. Rep. No. 1112, 78th Cong., 2nd Sess. (1944) ... 9

MISCELLANEOUS:

Clark and Samenow, The Summary Judgment, 38 Yale L. J. 423 (1929) 16
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47 Col. L. Rev. 1314 (1947) 8, 14
32 Geo. L. J. 66 (1943) 6

No. 178

Supreme Court of the United States

OCTOBER TERM, 1950

THE NORTH LITTLE ROCK TRANSPORTATION COMPANY, INC.,
Petitioner,
versus
CASUALTY RECIPROCAL EXCHANGE,
et al.,
Respondents.

BRIEF FOR RESPONDENTS NATIONAL BUREAU OF CASUALTY UNDERWRITERS, AETNA CASUALTY & SURETY CO., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is an action for treble damages and injunctive relief, based upon an alleged violation of Section 1 of the Sherman Act. The case was commenced on August 17, 1948 by the filing of a summons and complaint. Petitioner thereafter, and before joinder of issue, conducted exploratory examinations of various persons to determine whether its complaint should be amended (R. 26-150). The complaint was not amended.

The verified answer of these respondents, in addition to admissions and denials, contained a separate and complete

affirmative defense. All parties thereafter agreed upon the truth of the facts contained in that affirmative defense, together with certain additional facts (R. 15, 25, 151-155). Virtually all the facts are matters of public record (R. 225).

The Insurance Commissioner of Arkansas, by the Attorney General of that State, intervened on February 11, 1949. The Commissioner upheld the conduct and legal contentions of the respondents and asked for dismissal of the complaint (R. 24, 25).

Motions by the respondents for summary judgment were argued before the District Court on February 15, 1949, on which date the Court also held a pre-trial hearing. The Court found that there was no genuine issue as to any material fact and that all such facts were before the Court. The Court framed the legal questions and ordered the submission of written briefs (R. 219).

On September 8, 1949 the Court granted the motions of respondents in all respects, stating the material facts and the reasons for its decision in a written opinion reported in 85 F. Supp. 961. The Court of Appeals for the Eighth Circuit unanimously affirmed, its opinion being reported in 181 F. 2d 174.

The Facts

Petitioner is a taxicab company operating in and about Little Rock, Arkansas. The first-named respondent is the Casualty Reciprocal Exchange, an insurer transacting the business of casualty insurance in the State of Arkansas and elsewhere. The other respondents are the National Bureau of Casualty Underwriters (an unincorporated association) and forty-nine casualty insurance companies which are among its members and subscribers. The Casualty Reciprocal Exchange is not a member of or subscriber to the National Bureau. Every respondent is authorized to transact its respective business in the State of Arkansas (R. 221, 222, 16, 19, 25, 155).

Respondent National Bureau of Casualty Underwriters (hereinafter referred to as "The National Bureau") is a voluntary, non-profit, unincorporated association of stock companies engaged in casualty insurance. It is a "rating organization"; in conformity with law, it secures and analyses data and thereafter establishes for its members (and for other insurers subscribing to its rating services) proper underwriting rules, classifications for risks, policy provisions and other forms, manual rates, minimum premiums and rating plans (R. 221, 16, 25, 155).

Under the Constitution and Regulations of the National Bureau, every member and subscriber must comply with its determinations except (a) when such compliance is established to be in violation of law, or (b) when such insurer is ordered or permitted to act otherwise by public governmental authority duly empowered by law to issue such order or permission. Upon proper application, any stock company engaged in casualty insurance may become a member of the National Bureau. Any insurer engaged in such insurance may become a subscriber and under National Bureau Regulations it must receive rating services without discrimination. However, only members may vote in Bureau meetings and be represented on Bureau committees (R. 222, 16, 25, 155).

Pursuant to applicable law, the National Bureau is licensed and authorized to act as a rating organization for automobile liability insurance and other kinds of insurance by the State of Arkansas and by every other State providing for the licensing of such an organization (R. 222, 18, 25, 155).

From July 24, 1946 to May 16, 1948 petitioner was insured by respondent Casualty Reciprocal Exchange for automobile liability insurance covering its taxicab operations. While the permissible loss ratio for such insurance is 64%, the losses incurred by petitioner during that period amounted to 136.1%. The Exchange accordingly canceled its policy effective May 16, 1948 (R. 222, 20, 25, 155).

Petitioner sought insurance from three other companies but each declined to accept such a risk. It then applied to the Arkansas Automobile Assigned Risk Plan, a cooperative undertaking by all insurers licensed to transact such business in Arkansas, under which each insurer agrees to accept an equitable number of risks which otherwise would be unable to obtain insurance. The Plan was organized in 1947 pursuant to Arkansas laws and with the approval of the Commissioner of Insurance for that State; it is similar to other such Plans in other States. Petitioner was assigned by the Plan to respondent Aetna Casualty and Surety Company, a member of the National Bureau. The Aetna accepted the risk and issued a policy effective May 16, 1948, agreeing with petitioner to receive an initial premium with the final premium to be computed when proper rate-making data became available (R. 222, 18, 20, 25, 155).

In order to obtain such data, the Aetna thereafter requested Casualty Reciprocal Exchange (through its representatives, Heart of America Insurance Agency, Inc.) to furnish to the Aetna a statement of the accident experience of petitioner under the Casualty Reciprocal Exchange policies. Such exchanges of rating data are necessary and customary within the industry in order to enable rating organizations and insurers to determine rates which are in accordance with the standards established by law. Certain incomplete data was furnished to the Aetna by the Exchange. In conformity with National Bureau procedures, the Aetna as a member submitted this data to the Bureau and requested it to establish a rate for the risk. After preliminary calculations by the National Bureau on the data submitted, at the request of petitioner the Arkansas Insurance Department obtained and sent to the Bureau what was stated to be complete information on petitioner's experience under the Casualty Reciprocal Exchange policies. On the basis of that information the National Bureau calculated a rate for the risk in accordance with an appropriate rating

plan, which was on file in the Arkansas Insurance Department and was effective in accordance with applicable provisions of law. The precise rate established for petitioner and the basis of its calculation were filed by the National Bureau in the Arkansas Insurance Department on or about July 16, 1948 (R. 223, 20, 25, 155).

According to the latest available statistics filed in the Arkansas Insurance Department, members and subscribers of the National Bureau write approximately 56% of all automobile liability insurance written in the State of Arkansas. In addition to National Bureau companies, there are carriers writing such insurance in Arkansas which are (a) members or subscribers of the Mutual Casualty Insurance Rating Bureau, another licensed rating organization similar to the National Bureau, or (b) insurers which are neither members of nor subscribers to any rating bureau and write such insurance at rates independently established by each insurer (R. 224, 19, 155-158).

On or about August 17, 1948 and without further communication with respondents or the Arkansas Insurance Department, petitioner commenced this action. The complaint describes the foregoing as a "pattern of action followed under a contract or conspiracy between them in restraint of trade or commerce among the several states" and in violation of Section 1 of the Sherman Act. Treble damages and certain injunctive relief are demanded in the complaint (R. 224, 7, 8).

Summary of Argument

The courts below correctly decided, in accordance with the decisions of this Court, that:

1. The Sherman Act is inapplicable to cooperative action among insurers in rate making and related matters, to the extent that such activities are regulated by State law;

2. The acts of these respondents were authorized and regulated by valid State laws; and

3. The motion for summary judgment should be granted.

ARGUMENT

POINT I

The Sherman Act is inapplicable to co operative action among insurers in rate making and related matters, to the extent that such activities are regulated by State law.

(A) Background of the applicable principles and statutes.

On June 5, 1944 this Court determined for the first time that (a) an insurance company conducting a substantial part of its business across State lines is engaged in "commerce among the several States" and is subject to regulation by Congress under the Commerce Clause of the Constitution and (b) the Sherman Antitrust Act is applicable to the business of insurance. *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533.

While the *S. E. U. A.* case was pending before the Court, there were introduced in both Houses of Congress companion bills to exempt the business of insurance from the Sherman and Clayton Antitrust Acts. H. R. 3270, S. 1362, 78th Cong., 1st Sess., introduced respectively on September 20 and 21, 1943. See Note (1943) 32 Geo. L. J. 66. These bills were still being considered at joint public meetings of House and Senate Judiciary Subcommittees when the *S. E. U. A.* decision was rendered. Joint Hearings on S. 1362, H. R. 3269, and H. R. 3270 before Subcommittees of Committees on the Judiciary, 78th Cong., 1st and 2nd Sess., Parts 1-6. On January 18, 1945 Senators McCarran and Ferguson introduced a proposal by the National Association of Insurance Commissioners. After prolonged debate and substantial amendment, it passed both Houses and was

approved by President Roosevelt on March 9, 1945. P. L. No. 15, 79th Cong., 1st Sess., Ch. 20, Secs. 1-5 (March 9, 1945); 59 Stat. 33, 34; 15 U. S. C. 1011-1015.

The pertinent text of the statute as enacted (hereinafter referred to as "The McCarran Act") is as follows:

> "Sec. 1. Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> "Sec. 3.(a) Until January 1, 1948 the Act of July 2, 1890 as amended known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.
>
> "(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The moratorium period in the Act, originally to end January 1, 1948, subsequently was extended by Congress to June 30, 1948. P. L. No. 238, 80th Cong., 1st Sess. ch. 326, appr. July 25, 1947.

During and after the moratorium every State and Territory (with the single exception of Idaho), and Congress for the District of Columbia, enacted or revised various regulatory laws concerning the business of casualty insurance. See Notes (1949) 3 Ark. L. Rev. 55 and (1947) 47 Col. L. Rev. 1314. As in Arkansas, all of these authorize rating organizations and other cooperative rating activities, under public supervision. There can be no doubt but that the object of these statutes was to accept the invitation of Congress expressed in the McCarran Act, to preserve State regulation and to render inapplicable the Federal antitrust laws.

(B) Wholly apart from the McCarran Act, rating combinations do not violate the Sherman Act if they are regulated by State law; by that statute, Congress expressly declared that State regulation of the insurance business is in the public interest, and provided that the States may permit, under public regulation, rating combinations and other activities which might otherwise violate the Sherman Act.

For purposes of the following discussion, we shall assume that the rating activities of the National Bureau are such that in ordinary interstate industries they would constitute a violation of the Sherman Act. We also shall assume, as we shall hereinafter demonstrate, that the Arkansas legislature has found it to be in the public interest to authorize such activities under State regulation, and that no Federal regulation exists in the field.

Under such circumstances, the State-regulated activities do not violate the Sherman Act. The acts authorized and regulated by the State are as effective as its acts and the Federal courts will not impute to Congress an intention to nullify what the State legislature has determined to be in the interests of its citizens. *Parker* v. *Brown,* 317 U. S. 341; *Olsen* v. *Smith,* 195 U. S. 332; *Field* v. *Barber Asphalt*

Paving Co., 194 U. S. 618, 619, 624. See also *United States* v. *South-Eastern Underwriters Association*, 322 U. S. at 562.

The text and legislative history of the McCarran Act demonstrates that Congress has intended that the States should have plenary and exclusive power to regulate the business of insurance. See McCarran Act, Secs. 1 and 2; Sen. Rep. No. 1112, parts 1 and 2, September 20, 1944, 78th Cong., 2nd Sess.; Sen. Rep. No. 20, Jan. 24, 1945, H. R. Rep. No. 68, Feb. 8, 1945, H. R. Rep. No. 143, Feb. 13, 1945, H. R. Rep. No. 213, Feb. 22, 1945, 79th Cong., 1st Sess.

In exempting the business of insurance from the anti-trust laws "to the extent that it is regulated by State law", Congress further intended that if the States determined that State-regulated rating bureaus and similar activities are in the public interest, such acts could not be held to violate the Sherman Act or the other enumerated statutes.* See 91 Cong. Rec. 1442, 1443, 1481, 1486 (1945).

The right of Congress to permit regulation by governmental authority, rather than by the free forces of competition is well established. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. It is equally well established that government has a special relation to insurance and that the business has "long been withdrawn from the benefits and caprices of free competition". *Osborn* v. *Ozlin*, 310 U. S. 53, 65.

Prudential Insurance Co. v. *Benjamin*

The history of the McCarran Act and the legislative purposes of its enactment were thoroughly examined by this Court in the case of *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408. An insurance company protested an annual

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* The sole exceptions to the foregoing are boycott, coercion and intimidation, which are not involved in this case (R. 227).

tax levied by South Carolina on foreign insurers (but not on domestic companies) as a condition of being authorized to do business within the State. The tax amounts to three per cent of the aggregate of premiums received from business done in South Carolina, regardless of its interstate or local character. Citing the *S. E. U. A.* decision, the insurer contended that the tax was an unconstitutional discrimination against interstate commerce in favor of local business. This Court unanimously upheld the tax.

The late Mr. Justice Rutledge traced the winding paths of the previous decisions, commenting that "the history of the commerce clause has been one of very considerable judicial oscillation", 328 U. S. at 420. The authorities cited by Prudential were distinguished on the ground that in none of them had Congress acted or purported to act, either by way of consenting to the State's tax or otherwise. The Court stated (Id. at 424):

> "None of the decisions conceded, because none involved any question of the power of Congress to make conclusive its own mandate concerning what is commerce. But apart from that function of defining the outer boundary of its power, whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval."

Since there was no contention by Prudential that commerce was not involved, the Court would give effect to the positive expression by the McCarran Act that the "continued regulation and taxation by the several States of the business of insurance" is in accord with Congress' policy. The court thus rejected the argument of Prudential that the Commerce Clause "of its own force", and without reference to any action by Congress, forbids discriminatory State taxation of interstate commerce.

Reviewing the McCarran Act, the Court found that it was the intention of Congress to "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." The Court declared (Id. pp. 430, 431):

> "Moreover, in taking this action [enactment of the McCarran Act] Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations."

South Carolina and Congress had acted in complete coordination to sustain the tax, the Court noted, and it is therefore "reinforced by the exercise of all the power of government residing in our scheme". Id. at pp. 435, 436. The judgment of the Supreme Court of South Carolina, upholding the tax, accordingly was affirmed.

Other pertinent decisions of this Court are in accord. See *Robertson* v. *California,* 328 U. S. 440, 457, 462; *Panhandle East. Pipe Line Co.* v. *Pub. Serv. Comm'n.,* 332 U. S. 507, 521.

Arguments of Petitioner

Petitioner has assailed the McCarran Act as unconstitutional, principally upon the ground that Congress has unlawfully delegated its legislative power to the States. Analysis of the brief shows that in support of this argument petitioner relies upon only one decision, i.e., *Knickerbocker*

Ice Co. v. *Stewart,* 253 U. S. 149. The *Knickerbocker* case and its related predecessors deal solely with the principles of maritime jurisdiction under admiralty law, and cannot be cited as authority in any other field. *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 247; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 124; *Davis* v. *Dept. of Labor,* 317 U. S. 249, 252, 255. This was made manifest by the Court itself in the *Knickerbocker* opinion, when it disclaimed any intention to impair the doctrine of Congressional consent to State legislation as expounded in *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311. Noting that the *Clark* case was concerned with the power of Congress under the Commerce Clause, this Court declared (253 U. S. at 166): "Here we are concerned with a wholly different constitutional provision [Article 3, Section 2]—one which for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states." The Court was careful to point out that the "distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. . . . " Id. at 161.

In any event, this Court has declared that no invalid delegation of power is contained in the McCarran Act. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 433, 438.

The only other constitutional argument made by petitioner is that "Congress cannot suspend a general law for a period of time except under war powers". This contention is as obscure as it is irrelevant. A hodgepodge of conflicting decisions are cited in the petition (pp. 10-12), most of which serve only to confuse whatever point petitioner is seeking to make.

Congress did not "suspend a general law"; it rendered the Sherman Act inapplicable to the insurance business until June 30, 1948 and inapplicable to it thereafter "to the extent that such business is regulated by State law".

It is well established, of course, that Congress may grant any such exemptions from the anti-trust laws, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 69; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 396; *N. Y. Central Securities Corp.* v. *United States,* 287 U. S. 12.

In enacting the McCarran Act Congress saw fit to keep alive "the hand of state regulatory bodies" in the matter of public supervision of a major interstate industry. *Connecticut L. & P. Co.* v. *Federal Power Com'n.,* 324 U. S. 515, 530. We accordingly submit that Congressional collaboration of this order, established to implement a policy determined by Congress in its legislative discretion, is free from constitutional defect. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408; *Connecticut L. & P. Co.* v. *Federal Power Com'n.,* supra.

POINT II

The acts of these respondents were authorized and regulated by valid State laws.

The lower courts have found and it is uncontested, that the respondents' acts of which petitioner complains were authorized and regulated by Act No. 116, Arkansas Laws 1947 (R. 227, 237).

The Arkansas rating law provides the system of regulation most common in the United States. In broad outline it provides that:

1. Rates must meet certain standards;

2. All rates must be filed with the State Commissioner of Insurance, who is granted various powers if rates fail to meet the statutory standards;

3. Companies may combine in rating matters but only if their organizations for such purposes are licensed and supervised by the State.

Such a system of regulation for various lines of insurance existed in many of the States at the time of the *S. E. U. A.* decision and passage of the McCarran Act. During the moratorium granted by Congress, the National Association of Insurance Commissioners and an All-Industry Committee met to consider a model form of rate regulatory law. After months of debate the model law was drafted and agreed upon (the sole disagreement being with respect to one word not relevant to this case). It is this model law which was enacted by the Arkansas legislature and most other States, and was adopted with varying amendments in almost all remaining jurisdictions. See 47 Col. L. Rev. 1314, 1321 (1947); 3 Ark. L. Rev. 55, 61 (1949); Proceedings, National Assn. of Insurance Commissioners, 77th Sess., pp. 212, 353-412 (1946).

The significance of enacting such model legislation will be apparent to the Court as establishing the reasonableness and legality of the law. Such considerations were weighed by the Supreme Court of Arkansas in *National Union Fire Ins. Co.* v. *Dickinson*, 128 Ark. 367 at 380, 194 S. W. 254. In upholding the legality of a rating law relating to fire insurance, Wood, J. declared:

> "But the fact that the method adopted by the Arkansas bureau is modeled after a bill that was recommended by the National Convention of Insurance Commissioners and enacted into law in several of the States is a cogent argument in support of the contention of the appellees that the method of the Arkansas bureau is not arbitrary or unreasonable."

Petitioner makes no effort to support its statement that the statute violates the State Constitution and the State antitrust laws. These points were examined and dismissed by the Courts below (R. 227, 238).

POINT III

The motion for summary judgment was properly granted.

There is in effect in Arkansas a comprehensive rate regulatory statute enacted by the State with the express consent of the Federal government. Under that statute rates charged in Arkansas must not be "excessive, inadequate or unfairly discriminatory". Methods of challenging rates, in addition to the required review by the Commissioner before they go into effect, are provided.

By this action, petitioner seeks to use the treble damage provisions of the Sherman Act to challenge the legality of its established premium rate and to be awarded "damages." This cannot be done. Even assuming a violation of the Sherman Act, the rate in effect under the Arkansas statutes is the legal rate and petitioner is not entitled to question it in proceedings under the Sherman Act. *Keogh* v. *Chicago & Northwestern Railway Co. et al.*, 260 U. S. 156.

In addition to the damages sought by petitioner, the complaint also prays for certain injunctive relief. This latter plea is obviously an attempt to have the Federal courts assume the proper duties and responsibilities of the Insurance Commissioner of the State of Arkansas. No such plea can be granted. The statute provides adequate means for the determination and correction of abuses and the Commissioner possesses the necessary data and ample powers to hear and determine any complaint. Any order or decision of the Commissioner is subject to judicial review in the State courts. See Section 5 and Subsection 6(d), Section 9 and Subsection 17(c) of Act No. 116, Arkansas Laws 1947. Federal courts will not attempt by injunction to usurp the authority and assume the responsibilities of duly constituted administrative officials. *United States Navigation Co., Inc.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Railroad Com'n*

of Texas v. *Pullman Co.*, 312 U. S. 496 at 500, 501; *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 615; See *Terminal Warehouse Co.* v. *Penn. R. R. Co.*, 297 U. S. 500 at 513, 514.

The answer of these respondents set forth detailed facts constituting an affirmative defense (R. 15-21). Those facts describe the nature and pertinent operations of the National Bureau, the company respondents, the Arkansas Automobile Assigned Risk Plan, and the exact details of all dealings between these respondents and petitioner. The truth of these facts has been attested by the sworn statements of the appropriate officers among these respondents, has been admitted by all parties, has been attested by the Arkansas Commissioner of Insurance and has been established by the trial court. (R. 23, 155, 25, 221-225). In addition, a stipulation as to the truth of certain additional facts was entered into between petitioner and these respondents and filed with the District Court (R. 151-180). The District Court found that all material facts were in evidence and that no genuine issue exists as to any material fact (R. 225).

These circumstances present precisely the type of situation in which a motion for summary judgment pursuant to Rule 56 is appropriate. Designed as an expeditious procedural device to obtain prompt justice for all parties in litigation, the Rule was intended to be used when there exists no genuine dispute as to any material fact and only questions of law are presented. *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (C. A. 2), cert. denied 325 U. S. 861; *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. A. 2), cert. denied 328 U. S. 870; 3 Moore, Federal Practice, Sec. 56.04 (1938); Clark and Samenow, *The Summary Judgment*, 38 Yale L. J. 423 (1929). See also, 10 Fed. Rules Serv., (Amendments) XCVII-XCVIII (1948). It has been specifically upheld as appropriate in cases under the anti-trust laws. *Intern'l Salt Co.* v. *United States*, 332 U. S. 392; *Associated*

Press v. *United States,* 326 U. S. 1; *Clark Oil Co.* v. *Phillips Petroleum Co.,* 148 F. 2d 580 (C. A. 8), cert. denied 326 U. S. 734.

Conclusion

The acts of these respondents were in accordance with statutes constituting due exercise of the governmental powers of the United States and the State of Arkansas. Respondents have not violated Section 1 of the Sherman Act, which is inapplicable to the acts of which petitioner complains.

In view of the foregoing, counsel for these respondents respectfully submit that the petition should be denied in all respects.

Respectfully submitted,

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PANY, EMPLOYERS CASUALTY COMPANY, FACTORY MUTUAL LIABILITY INSURANCE COMPANY OF AMERICA, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, FIREMEN'S FUND INDEMNITY COMPANY, GENERAL INSURANCE CORPORATION, GLENS FALLS INDEMNITY COMPANY, GLOBE INDEMNITY COMPANY, GREAT AMERICAN INDEMNITY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, THE HOME INDEMNITY COMPANY OF NEW YORK, LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, MANUFACTURERS AND MERCHANTS INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, NATIONAL AUTOMOBILE AND CASUALTY INSURANCE COMPANY, NATIONAL SURETY CORPORATION, NEW AMSTERDAM CASUALTY COMPANY, NEW YORK CASUALTY COMPANY, THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, PACIFIC EMPLOYERS INSURANCE COMPANY, PHOENIX INDEMNITY COMPANY, ROYAL INDEMNITY COMPANY, SERVICE CASUALTY COMPANY OF NEW YORK, STANDARD ACCIDENT INSURANCE COMPANY, TRADERS AND GENERAL INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, THE TRAVELERS INSURANCE COMPANY, UNITED NATIONAL INDEMNITY COMPANY, UNITED STATES CASUALTY COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LIMITED, CONSOLIDATED UNDERWRITERS, HIGHWAY INSURANCE UNDERWRITERS.